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No. 96-698

In The

Supreme Court of the United States

October Term, 1996

ROBERT D. DAUGHERTY,

Petitioner,

vs.

SARASOTA COUNTY, a political subdivision of the State of Florida,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This is a case about an experienced businessman and real estate broker, Robert D. Daugherty ("Daugherty") who sought to excavate 60 acres of property as a commercial borrow pit, without regard for the environmental impacts on his neighbors, after which he planned to develop the property as a "waterfront" residential development with houses around the flooded pits.

Sarasota County ("the County") brings the Court's attention to the following misstatements and omissions by Daugherty in his petition for a writ of certiorari:

1. Daugherty states that borrow pits were a permitted use in the zoning district applicable to his property (Pet. pp. 1-2). The zoning code provided, however, that this use was subject to compliance with the County borrow pit ordinance (Ord. 81-60). Under the provisions of Ord. 81-60, where excavated material is to be hauled off-site, an evidentiary public hearing is required before the County Commission, and no permit can be granted unless the County Commission determines, based on the evidence at the hearing, that the operation will not cause adverse environmental impacts such as excessive fugitive dust along the haul route (App. B, pp. 3a-3b).

2. All of Daugherty's borrow pit permit applications sought to use as his off-site haul route for between 100 to 200 dump truck trips per day, an unpaved, dirt access easement across developed residential subdivision lots. Daugherty consistently refused to agree at the public hearings before the County Commission to pave the access to avoid excessive amounts of fugitive dust. Such excessive fugitive dust had previously resulted in the revocation of a prior, ill-advised permit granted to Wendell Davids (App. B, p.4a).

3. Daugherty notes that following his last permit denial in 1989, he sought review of the County Commission's decision in state circuit court by petition for writ of certiorari (Petition, p. 2, ¶1). Under Florida law, this was, however, not a discretionary writ but an appeal of right, and the state court ruled on the merits that Daugherty had been accorded due process and that the County had complied with the essential requirements of law and that its decision was supported by substantial competent evidence. Daugherty took no further appeal from this judicial affirmance of the County Commission's denial of his permit (App. B, p. 5a).

4. Daugherty states that Ordinance 89-76 rendered futile any further efforts by Daugherty to obtain a permit (Petition, p. 2). In the aftermath of several legal challenges to commercial borrow pit denials, the County Commission, based on recommendations of its professional staff, amended the zoning code by Ord. 89-76 to limit the size of borrow pits in three related zoning districts to non-commercial, agricultural scale borrow pits pending adoption of strengthened environmental provisions in the County's borrow pit ordinance. Once those strengthened borrow pit regulations were adopted, the limitation on the size of borrow pits in all three zoning districts was repealed (App. B, pp. 4a-4b).

5. Daugherty asserts (Pet. p. 3, n. 1):

> The Court of Appeals erroneously claimed that the [just compensation] claims were dismissed on a motion for judgment as a matter of law. . . .

This is the beginning of an effort to manufacture an issue (Pet. p. 7, Point II) out of distortion and misrepresentation of the Eleventh Circuit's opinion. Daugherty's flawed contention

is that, either by mistake or perverse intent, the Court of Appeals improperly denied Daugherty a trial on his just compensation taking claims. The Eleventh Circuit opinion never incorrectly states that the *just compensation taking claims* were disposed of on a motion for judgment as a matter of law at the close of Daugherty's case-in-chief. Significantly, Daugherty fails to indicate where in the Eleventh Circuit opinion this statement was supposedly made.

It is clearly stated in the briefs before the Eleventh Circuit that the just compensation takings claims (Counts I and VI) were dismissed prior to trial on the County's motion to dismiss or for summary judgment (County's Initial Brief, p. 3).

In reviewing the procedural history of the case, the Eleventh Circuit opinion correctly states (App. B, pp. 6a-7a):

> The trial court received various motions *for summary judgment and for judgment as a matter of law*. In response, the trial court dismissed counts I and VI, containing the just compensation claims, for lack of subject matter jurisdiction because the just compensation claims were not yet ripe.
>
> * * *
>
> Finally the trial court dismissed the due process takings claims of Count V for lack of subject matter jurisdiction because it was not yet ripe.

In its discussion of the just compensation claims of Counts I and II (App. B, pp. 10a-12a), the Eleventh Circuit determined that these claims should not have been dismissed for lack of

ripeness. The Court of Appeals, however, had reviewed the record to determine whether the trial court had erred in granting the County's motion for judgment as a matter of law at the close of Daugherty's case-in-chief on his *due process taking claim (Count V)*. The Eleventh Circuit concluded that, with respect to the due process taking claim, Daugherty had failed to present sufficient evidence that he had been deprived of "all or substantially all economically viable use of his property". Since, in the context of this case, this was an element of proof essential to both the just compensation and due process takings claims, the Eleventh Circuit ruled that both types of taking claims must fail (App. B, pp. 11a-12a). Daugherty was afforded the opportunity at trial to prove a taking during his case-in-chief, and he simpy failed to do so.

It is ironic that Daugherty seeks to impugn the decision of the Eleventh Circuit for supposedly misapprehending the procedural history of this case regarding his just compensation claims in light of the fact that Daugherty's appellate brief erroneously asserted to the Eleventh Circuit that his just compensation claims had been barred by the trial court based on *res judicata* rather than ripeness! (Daugherty's Initial Brief on Cross Appeal, p. 48).

REASONS FOR DENYING THE WRIT

I.

COUNTY'S RESPONSE TO DAUGHERTY'S "REASONS FOR GRANTING THE WRIT"

Daugherty erroneously states that "The appellate opinion eliminates equal protection claim (sic) for non-minority landowners" (Pet. p. 4). The Eleventh Circuit opinion does *not* hold that non-minority landowners are without an equal protection remedy. It merely applies the established law that

where different treatment is accorded to persons and there are no "suspect classifications" involved (*e.g.*, race, ethnicity, gender, etc.) governmental action will be upheld if there is a rational basis for the different treatment (App. B, p. 13a). *Eide v. Sarasota County,* 908 F.2d 716 at 722 (11th Cir. 1990), *cert. denied,* 498 U.S. 1120, 111 S. Ct. 1073, 112 L. Ed. 2d 1179 (1991).

Daugherty requested the Eleventh Circuit to review the trial court's granting of judgment as a matter of law on his due process taking claim. The Eleventh Circuit reviewed the trial court's decision *de novo* and concluded after a review of the record that judgment as a matter of law was appropriate on all taking claims, including temporary taking claims, because of a failure of sufficient evidence by Daugherty in his case-in-chief that his property had been deprived of all or substantially all economically viable use (App. B, pp. 11a-12a).

II.

EQUAL PROTECTION CLAIMS

Daugherty demonstrates no conflict between the Circuits or with the decisions of the Supreme Court and instead merely asserts that the Eleventh Circuit's decision in this case applies a different standard from the standard in another Eleventh Circuit case, *E & T Realty v. Strickland,* 830 F.2d 1107 (11th Cir. 1987). *E & T Realty* is easily distinguishable from the Daugherty case because *E & T Realty* dealt with the administrative denial of ministerial matters rather than quasi-judicial and legislative actions by a local governing body. *E & T Realty,* 830 F.2d at 1114, n. 8. Judge Edmundson, who sat on the panel that decided *E & T Realty,* also sat on the panel in this case, making it even more implausible that the Court of Appeals misapprehended the applicability of *E & T Realty*.

The application of the rational basis standard of review to

equal protection cases which do not involve constitutionally suspect classifications, such as race, ethnicity, gender, etc., is well established. *Executive 100, Inc. v. Martin County,* 9222 F.2d 1536 (11th Cir.) *cert. denied,* 502 U.S. 810, 112 S. Ct. 55, 116 L. Ed. 2d 32 (1991).

To assert as Daugherty apparently does (Pet. p. 6) that the application of the rational basis standard of review means that:

> only certain classes (African Americans, women, etc.) not individuals will receive the safeguards of the equal protection clause of the Fourteenth Amendment . . .

is to ignore the decisions of this Court. *Cleburne v. Cleburne Living Center,* 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).

Daugherty (Pet. p. 6) misleadingly quotes only a portion of a footnote in the Eleventh Circuit opinion to give the impression that the Eleventh Circuit was holding that the equal protection clause does not apply to non-class-based discrimination. In fact, the full quote (App. p. 14a) makes it clear that, while speculating that it *could* dispose of Daugherty's equal protection claim on the basis of a lack of *any class-based discrimination, i.e.,* involving no "non-suspect" classification as well as no "suspect" classification, the Eleventh Circuit panel *specifically declined to base its ruling on such an argument.*

Apparently, Daugherty is seeking, through a scattershot argument infused with misstatements, to persuade the Supreme Court that the Eleventh Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of the Supreme Court's supervisory power. Rule 10(a), Rules of the Supreme Court.

Quite obviously, however, the Eleventh Circuit properly reviewed on appeal whether, with respect to Daugherty's equal protection claims, there was a rational basis for the denial of Daugherty's 1989 borrow permit application and whether there was a rational basis for the County Commission's adoption of Ordinance 89-76 limiting the size of borrow pits in various zoning districts (App. pp. 13a-14a). The determination of whether a rational basis exists for distinctions made by local governments between individuals in land use matters is a question of law for the court and subject to *de novo* review on appeal. *United States v. Garrett,* 3 F.3d 390 (11th Cir. 1993), *cert. denied,* __ U.S. __, 114 S. Ct. 1100, 127 L. Ed. 2d 413 (1994); *Greenbriar Ltd. v. City of Alabaster,* 881 F.2d 1570 at 1578 (11th Cir. 1989).

The Eleventh Circuit did not invade the province of the jury on Daugherty's equal protection claims but, instead, ruled on a fundamental question of law in accordance with the established legal standard.

Accordingly, Daugherty's petition, based on his equal protection claims, is without merit.

III.

TAKING CLAIMS

Daugherty oddly and inappropriately characterizes the basis of the Eleventh Circuit's decision on his taking claims as a "joke" (Pet. p. 7). In reality, it is Daugherty's argument that is off-color and falls flat.

Daugherty tries to make much of the fact that his just compensation taking claims (Counts I and VI) were dismissed prior to trial on ripeness grounds despite the fact that he was

permitted to present his evidence and testimony on his due process taking claim (Count V) before judgment as a matter of law was entered against him at the close of his case-in-chief, also on ripeness grounds. At that time, the trial court stated that Daugherty had also failed to present sufficient evidence to support a finding that the County had deprived him of all or substantially all of the economically viable use of his property (App. B, p. 11a).

Contrary to Daugherty's statement that the Eleventh Circuit based its decision solely on a remark by the trial court (Pet. p. 7-8), the Eleventh Circuit *independently reviewed the record de novo* to determine whether judgment as a matter of law should have been granted (App. B, pp. 8a, 9a, 10a, 11a). Although the Eleventh Circuit ruled that the trial court should not have granted judgment to the County based on ripeness, it concurred with the trial court's assessment that Daugherty had failed to offer sufficient evidence to establish that any portion of his property had been deprived of all or substantially all economically viable use, *even on a temporary basis* (App. B, pp. 11a-12a).

Since Daugherty failed to present sufficient evidence on an element critical to both his due process taking claim as well as his just compensation claim, the Eleventh Circuit properly ruled that both types of taking claims must fail.

CONCLUSION

Daugherty's petition fails to establish any basis meriting consideration of his case by the United States Supreme Court.

No conflict is established between the holding in this case and the decisions of the other Circuits or the Supreme Court.

No *bona fide* departure is demonstrated by the Eleventh Circuit from the accepted and usual course of judicial proceedings in analyzing and ruling on the legal issues presented.

Daugherty's petition is but the latest extension of a shotgun lawsuit in federal court, following a meritless appeal in state court, from the denial of an ill-conceived and air polluting mining scheme. As with its progenitors, Daugherty's petition for a writ of certiorari should be denied.

Respectfully submitted,

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